

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,)
)
v.) Crim. No. 4-57-B-W
)
MICHAEL STEPHEN HEDIO, JR.,)
)
Defendant)

**RECOMMENDED DECISION ON
MOTION TO SUPPRESS**

This matter is before the court on the defendant's motion to suppress (Docket No. 10). Hedio claims that a firearm seized from his person on April 3, 2004, at a parking lot in Waterville, Maine, should be excluded from use as evidence because the law enforcement officers who stopped and frisked him lacked an articulable suspicion of criminal activity. I held an evidentiary hearing¹ on this motion on September 1, 2004. I now recommend that the court adopt the following proposed findings of fact and **DENY** the motion.

Proposed Findings of Fact

Jeffrey Bearce has worked as a law enforcement officer for over twenty years. He currently works as a Patrol Sergeant for the Waterville Police Department and in the past has been assigned to the Maine Drug Enforcement Agency. Sergeant Bearce has received specialized training in drug investigations and firearms offenses. On April 3, 2004, Sergenat Bearce was on duty in Waterville and received a call from one Randy

¹ The defendant did not attend the evidentiary hearing. His counsel indicated that he had received notice of the hearing, but indicated that he did not know if he could obtain transportation to Bangor. Counsel represented to the court that defendant was not requesting a continuance and that he was able to proceed without any prejudice to his motion without the defendant's presence. Based on counsel's representations I concluded that Hedio waived his right to be present at the motion hearing.

Hawes, who reported that he was in the vicinity of the Chez barroom in the south end of Waterville and that a man had approached him in the parking lot inquiring whether Hawes wanted to buy a gun the man had in his motor vehicle.

Sergeant Bearce testified that he has become well acquainted with Randy Hawes through his years of police work in the Waterville area. According to Sergeant Bearce, he has come into contact with Hawes approximately once a month in the course of his police work. In the past Sergeant Bearce has arrested Hawes for drunk and disorderly conduct, but he has also approached Hawes repeatedly as a reliable informant about criminal activity in the Waterville area. Hawes works in a local garage and apparently has many Waterville contacts. He has consistently provided Sergeant Bearce with reliable information in the past. As an example, Sergeant Bearce indicated that when he has responded to crime scenes in taverns in Waterville and Hawes has been present, Hawes has always provided honest and forthright responses to Sergeant Bearce's questions about what transpired. On many occasions Sergeant Bearce has confirmed the truth of Hawes' statements by speaking with other witnesses or reviewing other evidence. According to Sergeant Bearce, Hawes has never come forward with false information. I conclude from the testimony presented that, although Hawes may have ties with certain criminal elements or activities, he has proven himself to be a reliable informant. Thus, when Sergeant Bearce received the April 3 call from Hawes, he had good reason to believe that the information Hawes provided was true and reasonably anticipated that there would be a situation that needed to be addressed.

During Hawes's phone call, Hawes informed Sergeant Bearce that he was in the vicinity of the Chez, which Bearce described as a local "dive" in a rough neighborhood in

the south end of Waterville. According to Sergeant Bearce, the establishment has a reputation, at least among law enforcement personnel, as a place known for drug activity, fights and other barroom problems. Sergeant Bearce described the Chez's clientele as locals and "hard partiers." Sergeant Bearce indicated that Waterville police officers are not permitted to enter the Chez alone, but must always have a partner accompany them inside. In the past couple of years Sergeant Bearce has arrested two or three people with firearms on the Chez's premises. When working as a MDEA agent, Bearce knew that drug dealers with firearms frequented the Chez. Sergeant Bearce also testified that felons frequent the Chez on a regular basis and when entering the Chez he has on a regular basis seen people he arrested in the past and knows to be felons prohibited from having firearms. Bearce describes the Chez as the type of establishment where they sell only two things, drugs and alcohol.

As Bearce and his fellow officer were en route to the Chez, Randy Hawes flagged them down from an adjoining sidewalk. Hawes gave Sergeant Bearce a description of the man who tried to sell him the gun and pointed out the location in the Chez's parking lot of the vehicle the man had been in. Hawes informed the officers that the man had gone into the "smoking room" adjacent to the tavern at the Chez. Sergeant Bearce and his associate intended to go into the Chez and "take care of the problem." Sergeant Bearce testified that he was concerned about a gun being on the licensed premises where liquor was being sold and he was also concerned about a firearm in the neighborhood because children routinely play on streets and sidewalks adjacent to the Chez and there are a number of residential units in the area. As the officers prepared to enter the establishment, two men exited the Chez and proceeded to walk toward the vehicle

described by Hawes. One of the men, Hedio, matched the description of the man Hawes said was trying to sell the gun. Sergeant Bearce and his associate intercepted the two men approximately two feet from the parked car. Sergeant Bearce immediately patted down Hedio and discovered the firearm in his waistband. Sergeant Bearce seized the weapon at that time. At that time of the encounter Sergeant Bearce did not know that Hedio was a felon prohibited from having a firearm. Nor was Sergeant Bearce investigating specific criminal activity such as a burglary or robbery that might have been connected to the gun.

Discussion

Both the Government and the defendant agree that the stop and frisk conducted in this case was a seizure that must be analyzed according to the standard set forth in Terry v. Ohio, 392 U.S. 1 (1968). Therefore the court must determine whether Sergeant Bearce has articulated sufficient, specific facts that, taken together with rational inferences from those facts, generate enough suspicion of possible criminal behavior to warrant an investigative stop and frisk. Id. at 21. The Government relies upon United States v. Gibson, 64 F.3d 617 (11th Cir. 1995), a case with somewhat analogous facts, in support of its argument that the weapon should not be suppressed. In Gibson, the police received an anonymous tip that an armed man was in a Miami barroom. They responded to the scene, found a man matching the description, and conducted a Terry stop that the court found did not violate the Fourth Amendment. Hedio relies primarily upon United States v. Parker, 15 F.3d 654 (7th Cir. 1994), in support of his motion. The Seventh Circuit concluded in that case that an anonymous tip of a "suspicious vehicle . . . with four black male occupants . . . in a predominantly black neighborhood," at one o'clock in the

morning, did not, in itself, warrant an investigative seizure. Id. at 655, 659 ("In order to protect the constitutionally guaranteed rights of us all, the minimum threshold of 'specific and articulable facts' sufficient to give rise to reasonable suspicion must be higher, albeit marginally, than those presented here.")

Both of the cases cited by the parties are different from the present case in one crucial respect. This case does not involve an anonymous tipster. Hawes's reliability cannot reasonably be questioned on these facts. As defendant acknowledges, the issue here is not whether the information that Hedio was armed was reliable, but whether that information was sufficient to give rise to a reasonable suspicion of criminal activity. Defendant argues that merely trying to sell a gun in a disreputable location known for harboring drug dealers and convicted felons, does not give rise to a reasonable suspicion of particularized criminal activity that would support the minimal intrusion of a pat down search for weapons. According to defendant's theory, the police would have to observe the particular crime that they were investigating at the time they approached Hedio. I do not believe that Parker or any of the post-Terry case law requires that degree of specificity. None of the cases cited by the parties turn on that question; instead the case law focuses on the reliability of the information received from anonymous tipsters, a nonissue on these facts.

The real issue in this case is whether the information provided by Hawes, coupled with Sergeant Bearce's law enforcement experience and his knowledge of the Chez, its denizens and surroundings generated a sufficient suspicion of "possibly criminal behavior," Terry, 392 U.S. at 22, to justify an investigatory seizure and frisk. I conclude that they did. In Terry the Supreme Court held that officers acted reasonably in seizing

and frisking men who were not actually observed committing a crime, but whose apparent canvassing of a store raised a reasonable suspicion that they might be planning or about to engage in a "stick-up." *Id.* at 22-23, 27-28. Although Sergeant Bearce did not actually observe the specific activity that generated suspicion in this case, Sergeant Bearce reasonably relied upon information provided by a proven, reliable informant and, on the basis of that information, had before him sufficient facts and circumstances to stop Hedio in order to investigate a matter of legitimate police concern. Furthermore, based on the fact that Hedio was known to be in possession of a firearm, it cannot reasonably be disputed that a frisk of Hedio was reasonable from the standpoint of officer safety, *id.* at 26-27, particularly in view of the location in which the investigation was being conducted, *see United States v. Trullo*, 809 F.2d 108, 111 (1st Cir. 1987) (holding that Boston "Combat Zone" setting was an important factor in assessing whether suspicions of possibly criminal conduct were justified and that officer's approach with gun drawn did not exceed the bounds of reasonableness).² Although Wateville's Chez and environs are certainly not on par with Boston's Combat Zone, the evidence reflects that they are sketchy enough to make an attempted parking lot gun sale sufficiently suspicious to warrant *Terry*-type investigatory measures.

Conclusion

Based upon the foregoing I recommend that the court adopt my proposed findings of fact and **DENY** the motion to suppress.

NOTICE

² In *Trullo*, the First Circuit indicated that it was dealing with the "outermost reaches of a permissible *Terry* stop." 809 F.2d at 111. Because Sergeant Bearce knew that Hedio possessed a gun and did not approach Hedio with his weapon drawn, the circumstances of this case can only fall within those "outermost reaches" charted by *Trullo*.

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated September 10, 2004

Assigned to: JUDGE JOHN A.
WOODCOCK JR.

Referred to:

Defendant(s)

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JR (1)**

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Pending Counts

UNLAWFUL TRANSPORT OF
FIREARMS, ETC.
(1)

Disposition

Highest Offense Level (Opening)

Felony

Terminated Counts

None

Disposition

**Highest Offense Level
(Terminated)**

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None

Complaints

None

Disposition

Plaintiff

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